IN THE

Supreme Court of the United States

October Term, 1979

No. 78-1883

EXECUTIVE JET AVIATION, INC., Petitioner,
v.
HONORABLE PATRICIA A. BOYLE, Judge of the United States District Court, Eastern District of Michigan, Southern Division, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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June 15, 1979

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IN THE

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No. .....

EXECUTIVE JET AVIATION, INC., Petitioner,
v.
HONORABLE PATRICIA A. BOYLE, Judge of the United States District Court, Eastern District of Michigan, Southern Division, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Executive Jet Aviation, Inc. respectfully prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on March 22, 1979.

OPINION BELOW

The March 22, 1979, order of the Court of Appeals, unpublished, appears in the Appendix; no opinion was rendered by the Court of Appeals for the Sixth Circuit.

On February 9, 1979, Respondent entered orders remanding cause in the principal cases of the *Estate of Harold Ray Carroll* v. *Gates Learjet Corporation, et al.*, and the *Estate of Daniel Keith Green* v. *Gates Learjet Corporation, et al.*, United States District Court for the Eastern District of Michigan, Southern Division, Case Numbers 873324 and 873325 respectively, to the Circuit Court for the County of Wayne, Detroit, Michigan; copies of the orders appear in the Appendix. The Respondent's opinion was pronounced orally on the record on February 2, 1979, and is reproduced in the Appendix.

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on March 22, 1979. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether issuance of a Writ of Mandamus by the Court of Appeals is the appropriate remedy where a District Court enters a remand order that is not only erroneous but also states it is based on non-statutory grounds.

2. Whether a mere proposed order in State court proffered by the sole non-diverse party defendant to eliminate it from State court action can create diversity requisite to federal removal jurisdiction.

3. Whether a mere proposed State court order proffered by the sole non-diverse defendant to eliminate it from State court action can create removal jurisdiction diversity and satisfy the requirements of 28 U.S.C. § 1446 (b) as an "other paper" by which a case "is or has become removable."

4. Whether "waiver" of the right to remove is a statutory ground upon which remand may be based.

5. Whether "waiver" of the right to remove may arise prior to removability arising.

STATUTES INVOLVED

United States Code, Title 28:

§ 1446. Procedure for removal.

* * *

(b) . . . If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

§ 1447. Procedure after removal generally.

* * *

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . .

STATEMENT OF FACTS

This Petition arises out of the proper removal pursuant to 28 U.S.C. § 1446(b) by Petitioner of two consolidated causes (principal cases) then pending in the Circuit Court for the County of Wayne, Detroit, Michigan. A. 12-18a. Respondent erroneously remanded the removed cases. A. 23a-25a. The Sixth Circuit summarily denied Petitioner's Petition for Writ of Mandamus.[1] A. 29a-30a.

Both principal cases arose out of the crash of a business jet shortly after take-off from Detroit Metropolitan Airport on December 15, 1972. The pilot and co-pilot of the

[1]The order of the Court of Appeals (A. 30a) cites *Kerr* v. *U. S. District Court*, 426 U.S. 394 (1976), and *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379 (1959), as authority for its denial of Petitioner's petition for writ of mandamus. Neither case is applicable. To state that Petitioner has no right to a writ of mandamus under the circumstances of the principal cases is to reject *Thermtron Prod. Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976). The Court has already stated that mandamus is the appropriate remedy where remand is erroneous and based on non-statutory grounds. Clearly, where the District court remands for erroneous and non-statutory reasons, the relief of mandamus is appropriate to prevent nullification of the removal statutes.

aircraft were killed instantly upon impact with a gasoline storage tank approximately one mile from the end of the take-off runway. The aircraft was a Model 23 Learjet, manufactured by Gates Learjet Corporation, a Delaware corporation with its principal place of business in Witchita, Kansas,

The aircraft was owned by Howard W. Zantop, a citizen of the State of Michigan, and operated by Zantop Airways, Inc., a Michigan corporation with its principal place of business at Detroit Metropolitan Airport, Romulus, Michigan. The pilot, Daniel Keith Green, and co-pilot, Harold Ray Carroll were both employees of Zantop Airways.

The Estate of Daniel Keith Green, deceased, by Mary Lynn Green, administratrix, (plaintiff Green) and the Estate of Harold Ray Carroll, deceased, by Marlene Carroll, administratrix, (plaintiff Carroll) filed civil actions in Wayne County Circuit Court, Detroit, Michigan, against Gates Learjet Corporation, a foreign corporation, (defendant Learjet); Executive Jet Aviation, Inc., a foreign corporation, (Petitioner); and Howard W. Zantop, (defendant Zantop), jointly and severally. The principal cases bore Wayne County Civil Action Numbers 73-256770-CZ and 74-019946-CZ respectively.

The principal cases proceeded on similar courses of discovery after consolidation for discovery purposes and thereafter were consolidated for trial in the Wayne County Circuit Court. In early November, 1978, plaintiff Green reached a settlement with defendant Learjet in the amount of $500,000. Settlement between plaintiff Carroll and defendant Learjet was concluded in December, 1978, in the amount of $350,000.

On November 21, 1978, the matters were assigned to

Irwin Burdick, Wayne County, Michigan, Circuit Court Judge and he retained the cases.

On November 22, 1978, Judge Burdick began hearing pretrial motions. On Thursday and Friday, November 23 and 24, settlement discussions took place between plaintiffs Green and Carroll and defendant Zantop.

On Monday, November 27th, a chambers conference was held by Judge Burdick with respect to defendant Zantop's motion for summary judgment. Plaintiffs stated at that time they were withdrawing their opposition to the motion and the court was advised of settlement between both parties and Zantop. When court convened on November 27, 1978, defendant Zantop's counsel raised the motion for summary judgment. Plaintiffs withdrew opposition (plaintiff Green stating no opposition had been filed and plaintiff Carroll stating that they did not oppose). The court noted on the record that payment had been or would be received by plaintiffs from defendant Zantop and granted the unopposed motion for summary judgment. A. 7a.

On December 4, 1978, counsel for defendant Zantop presented a proposed order granting summary judgment which was approved by counsel for Petitioner and both plaintiffs. However, although granted orally on November 27, 1978, the order granting Zantop's motion for summary judgment was not presented to the court for signing or entry until December 26, 1978.

On December 27, 1978, Petitioner Executive Jet filed its petitions and bonds[2] for removal to the United States Dis-

[2]Counsel for Petitioner prepared its petition for removal before non-diverse defendant Zantop's counsel circularized the proposed order. The bond for removal was executed and issued by the surety's attorney-in-fact and Petitioner's counsel on December 5, 1978, in anticipation of filing removal papers upon signing of the order by which non-diverse defendant Zantop would be eliminated from the case making it removable. (A. 18a)

trict Court for the Eastern District of Michigan, Southern Division. The principal cases were prospective companion cases to one another as well as to a cause pending in United States District Court, *Ranger Insurance Co.* v. *Gates Learjet Corporation* (Case No. 75-572439), which case had been assigned to Respondent and in which Petitioner is a third party defendant. The principal cases were assigned to Judge Boyle as companion cases under Local Rule XXIV on January 24 and 25, 1979.

Plaintiff Green's motion and brief for remand were filed on January 12, 1979. Plaintiff Carroll's motion and brief for remand were filed on January 28, 1979. Petitioner filed its briefs in opposition on January 31, 1979.

Argument on plaintiffs' motions for remand were heard by Respondent on February 2, 1979; Respondent gave her opinion and ruling on the record. A. 18a-22a. On February 9, 1979, the orders remanding cause were signed and entered by the Respondent. A. 23a-25a. On February 14, 1979, defendant Executive Jet's petition for writ of mandamus or in the alternative writ of prohibition was filed in the United States Court of Appeals for the Sixth Circuit. On February 15, Petitioner sought a stay of Respondent's remand orders from Respondent, which request was denied.[3] A. 26a. On February 16, 1979, Petitioner sought a stay of Respondent's remand orders in the United States Court of Appeals for the Sixth Circuit which was denied. A. 27a. On February 21, 1979, Petitioner applied for a stay

[3]Respondent's denial of Petitioner's motion for stay of her remand order cites *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U. S. 336, 344 (1976), as authority for denial of the stay. A. 26a. Petitioner does not agree that waiver is a ground for remand. See argument p. 16 and 17, *infra*.

of orders remanding cause to Sixth Circuit Justice Potter Stewart, which application was denied. A. 28a. On February 23, 1979, Petitioner's application was reheard by Justice Byron White and the entire Court, the application was denied. A. 29a.

On March 22, 1979, Petitioner's petition for writ of mandamus was denied by the United States Court of Appeals for the Sixth Circuit. A. 29a-30a.

REASONS FOR GRANTING THE WRIT

Notwithstanding the 28 U.S.C. § 1447(c) bar to appellate review of District Court remand orders, the use of mandamus has been sanctioned by the Court in cases involving error and remand on grounds not approved by the controlling statutes. Petitioner contends that Respondent erroneously remanded the causes removed by Petitioner and based her remand on grounds not authorized by the statute. Petitioner further contends that in such cases the appropriate remedy is a petition for writ of mandamus to the Court of Appeals and the summary denial by the United States Court of Appeals for the Sixth Circuit of Petitioner's petition for mandamus was improper and constitutes approval of Respondent's error. Respondent's erroneous remand creates chaos with the orderly operation of a carefully drawn statute, the result of which is to force all removals to be based on speculation and put removing defendants to the task of divining when removal is appropriate.[4] The lower courts' action and its effect justify issuance by this Court of a writ of certiorari to the Sixth Circuit Court of Appeals.

[4]Petitioner did not speculate on the appropriate time for removal. See note 2, p. 5, *supra*.

WHERE A DISTRICT COURT ENTERS A REMAND ORDER THAT IS NOT ONLY ERRONEOUS BUT ALSO STATES IT IS BASED ON NON-STATUTORY GROUNDS, ISSUANCE OF A WRIT OF MANDAMUS BY THE COURT OF APPEALS IS THE APPROPRIATE REMEDY.

Mandamus in the Court of Appeals is the appropriate mode by which to require a District Court to hear a case which has been erroneously remanded. *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976). Justice White, delivering the opinion of the Court, wrote in *Thermtron, supra* at 353:

> There is nothing . . . that leads us to question the availability of mandamus . . . where the district court has . . . remanded it on grounds not authorized by the removal statutes. [Citations omitted.] [T]hese cases would support the use of *mandamus to prevent nullification of removal statutes* . . . (Emphasis added.)

In *Gravitt* v. *Southwestern Bell Telephone Co.*, 430 U.S. 723 (1977), in a per curiam opinion, the Court reviewed a petitioner's contention that a District Court remand order stating the case was "improperly removed" was insufficient to satisfy the statute. The Court held, *supra* at 723:

> The District Court's remand order was plainly within the bounds of § 1447(c) and hence was unreviewable by the Court of Appeals, by mandamus or otherwise.

The Court then referred to Thermtron stating that it "re-emphasized the rule that *§ 1447(c) remands are not reviewable.*" (Emphasis added.) *Supra* at 724.

Thus, only remand pursuant to § 1447(c) is not reviewable; remand which is *not* made because a case is removed "improvidently and without jurisdiction" does not come

within the 28 U.S.C. § 1447(d) bar to review of remand orders contemplated by *Thermtron* and *Gravitt*. *See also Volvo Corp. of America* v. *Schwarzer*, 429 U.S. 1331 (Rehnquist, Circuit Justice 1976), *cert. denied*, 430 U.S. 915 (1977).

Thermtron set-out the additional requirement that the remand be based upon non-statutory grounds to be reviewable. Justice White wrote, *supra* at 343, 345:

> The issue before us now is whether § 1447(d) also bars review where a case has been properly removed and the remand order is issued on grounds not authorized by § 1447(d). * * *
>
> We agree with petitioners: The District Court exceeded its authority in remanding on grounds not permitted by the controlling statute.

The United States Court of Appeals for the Fifth Circuit succinctly restated the *Thermtron* holding in *In re Merrimack Mutual Fire Ins. Co.*, 587 F. 2d 642, 645 (5th Cir. 1978):

> In sum, the Thermtron Court held that when a district court enters a remand order that is not only erroneous but also states that it is based on non-statutory grounds, issuance of a writ of mandamus by an appellate court is an appropriate remedy.

In the principal cases removed and remanded by Respondent for which Petitioner sought mandamus, not only was the Respondent's remand order erroneous for the reason that it misinterpreted and effectively rewrote the controlling statute,[5] but her opinion and order both stated "waiver" as the basis for remand which is clearly a non-statutory ground.[6] Her orders were therefore reviewable by mandamus.

The denial by the United States Court of Appeals for the

[5]See p. 16, *infra*.
[6]See p. 17, *infra*.

Sixth Circuit of Petitioner's petition for writ of mandamus was therefor erroneous and justifies the granting of certiorari for review of the Judgments below.

A MERE PROPOSED ORDER IN STATE COURT PROFFERED BY THE SOLE NON-DIVERSE PARTY DEFENDANT TO ELIMINATE IT FROM STATE COURT ACTION CAN NOT CREATE DIVERSITY REQUISITE TO FEDERAL JURISDICTION.

The federal statute controlling removal of cases which are not removable by their initial pleadings, 28 USC § 1446(b), provides in pertinent part:

> [A] petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

The language of the statute requires "receipt . . . of a copy of an . . . order or other paper" which contemplates some documentary notice to defendant. An oral court order does not fall within the means by which a defendant may first ascertain removability. Not only does federal law require some documentary notice by the plain language of the statute, but Michigan law requires that for an order to become effective it must be reduced to writing and signed by the Judge.

Goldstein v. *Kern*, 82 Mich App 723, 267 N.W.2d 165 (1978), involved as its controlling question, whether a summary judgment became effective upon a court's oral pronouncement. The Michigan court of appeals held that the case of *Tiedman* v. *Tiedman*, 400 Mich 571, 255 N.W.2d 632 (1977), governed. In *Goldstein*, "the trial court orally granted [summary judgment] at the close of the hearing."

Supra at 726. The court, relying on *Tiedman*, held, *supra* at 726:

> [T]he *judge must declare* that such statement is to be given *immediate effect* as a judgment *without* any *further action or signing of a written judgment. Tiedman*, at 577. A review of the record in this case clearly shows that the trial court's oral pronouncement did not possess these characteristics. Summary judgment, therefore, did not become effective before plaintiff moved to file his amended complaint. (Emphasis added.)

In the State court proceedings prior to removal, Wayne County Circuit Court Judge Irwin Burdick, stated:

> THE COURT: All right. Therefore, at this time, the Motion for Summary Judgment made by Zantop against the two Plaintiffs and against Gates Learjet, will be granted. (A. 7a-8a)

Plainly, by the language of Judge Burdick's oral pronouncement, he did not "declare" that his granting of summary judgment was to be given "immediate effect as a judgment without any further action or signing of the written judgment. . . . A review of the record in this case clearly shows that the trial court's oral pronouncement did not possess these characteristics." *Goldstein, id.* Hence, the rule announced in *Tiedman, supra* at 576, must be given effect:

> The rule is well established that courts speak through their judgments and decrees, not their oral statements or written opinions. [Footnote omitted.] Generally, a judgment or order is reduced to written form, as was contemplated in this case; *until reduced to writing and signed, the judgment did not become effective* and the parties remained married. (Emphasis added.)

Thus, Judge Burdick's order did not become effective until

reduced to writing and signed by him on December 26, 1978. Since it was not effective until signed, the sole non-diverse defendant, Howard W. Zantop, was not eliminated from the case until December 26, 1978, and federal diversity jurisdiction could not arise until that date. Therefore, the case did not become removable until December 26, 1978.

The Respondent held that the proposed order offered by counsel for defendant Zantop, to which only two counsel affixed their signatures on December 4, 1978, was an "other paper" by which the Petitioner's right to remove arose within the meaning of the statute and that Petitioner's participation in State court proceedings between December 4 and December 27, constituted a waiver of its right. This is wrong: a non-existent order cannot create diversity essential to federal jurisdiction; without diversity the principal cases could not be removed and no right to remove existed; without a right to remove there was no right to "waive."

A MERE PROPOSED STATE COURT ORDER PROFFERRED BY THE SOLE NON-DIVERSE DEFENDANT TO ELIMINATE IT FROM STATE COURT ACTION CAN NOT CREATE REMOVAL JURISDICTION DIVERSITY AND SATISFY THE REQUIREMENTS OF 28 U.S.C. § 1446(b) AS AN "OTHER PAPER" BY WHICH A CASE "IS OR HAS BECOME REMOVABLE.

The language of the second paragraph of 28 U.S.C. § 1446(b) requires generally that the record of the court from which removal is sought be the source from which to ascertain whether a case originally not removable has become removable. The statute expressly states the sources from which a defendant may ascertain such facts: "a copy of an amended pleading, motion, order or other paper."

In *Putterman* v. *Daveler*, 169 F. Supp. 125, 129 (1958), the court wrote that the language of the statute " 'a copy of an amended pleading, motion [or] order' must refer to a pleading, motion or order in the case then pending and which would appear in the record." The court held that the phrase "other paper" was not intended to override or supplant "the expressed sources and refer to any extraneous paper but means some other paper appearing in the record of the Court which might not fall within the express language used." *Id.*

This concept of "other paper" has been enlarged where the "other paper" is received by a removing defendant and by such paper it may be determined that removability exists or existed prior to its receipt.

In the only case cited by the Respondent in support of her ruling, *Gibson* v. *Atlantic Coast Railroad Co.*, 299 F. Supp. 269 (1969), a motion was filed to amend the State court complaint to meet the $10,000 jurisdictional requirement of 28 U.S.C. § 1332. The amount in controversy would have met federal jurisdictional requirements at the time of injury had it been pleaded; however, it was necessary for the plaintiff to properly plead. Since the time within which to amend plaintiff's complaint had expired, it was necessary to obtain leave of court. Although not originally stating sufficient damages to meet federal jurisdiction, the amended complaint, and acknowledgment by the court that the amended complaint was appropriate, was sufficient to meet federal jurisdiction requirements. It was only necessary for the court to fix a time at which the 30-day statutory period for removal began to run. The court apparently believed that the service of motion papers by which the complaint was to be amended, although appearing in the record of the case, would not be sufficient "other paper"

to commence the 30-day period since the motion could have been denied and removal then impossible by the motion papers removability could not be ascertained. The motion to amend complaint was then granted, confirming the legal existence of a sufficient amount in controversy to meet federal requirements. The oral granting of plaintiff's motion to amend was not adequate to make the case removable but the court held that service of the proposed order granting leave to amend was sufficient "other paper" to begin measurement of the 30-day period because by it the case first appeared as "one which is . . . removable." The proposed order merely marked the measuring date and was confirmatory of an *existing* fact.

Gibson is easily distinguished from the principal cases removed by Petitioner and cannot provide reliable authority for Respondent's remands. In the principal cases Petitioner removed, no "other paper" existed which revealed federal diversity jurisdiction simply because diversity did not exist until defendant Zantop was eliminated as a non-diverse party defendant when Judge Burdick signed the order. In *Gibson*, removability already existed requiring only pleading the amount in controversy properly; in the principal cases removed to Respondent's court, removability could not exist by an "other paper." The "other paper" must reveal a fact already in existence and only in such case may that provision of the removal statute become operative. In the principal cases the most that could be revealed by the other paper relied upon by Respondent was a prospective event which might create diversity if it in fact occurred.

Thus, although it became apparent on December 4, 1978, that the cases *might* become removable, they did not in fact

become removable until diversity existed; that is, when Zantop was eliminated from the cases. No diversity could exist until there was an "order" of the State court, dismissing the sole non-diverse party defendant Howard W. Zantop. This did not occur until December 26, 1978.

Respondent's orders for remand were erroneous on their face, stating as grounds that a proposed order, which could not take effect until some future date, and therefore could not create diversity requisite to federal removal jurisdiction, was a sufficient "other paper" within the meaning of the statute. Such a ruling effectively rewrites a carefully drafted statute, in pertinent part, as follows:

28 U.S.C. § 1446(b)	Respondent's Revision
other paper from which it may first be ascertained that a case is one which **is or has become** removable.	other paper from which it may first be ascertained that a case is one which **will become** removable.[7]

(Emphasis added.)

The order in the State court could not become effective until signed by Judge Burdick on December 26, 1978. The Respondent's construction of a proposed order as an "other paper" is error and in effect rewrites the controlling removal statute and nullifying its validity. Such error must not be disregarded and must not be permitted to prevail; to do so emasculates the Act of Congress and vitiates Petitioner's right to remove. Moreover, it makes this part of the removal statute completely unworkable and forces a removing defendant to rely wholly on speculation.

[7]Respondent stated in her oral opinion: "I find that under 1446(b) the earliest date at which the Defendant knew, through copy of another paper, that it was first ascertained that the case was one which **would become** or which was removable was December 4th, which was the date . . . that the Order for Summary Judgment was presented for approval . . ." A. 20a. (Emphasis added.)

"WAIVER" OF THE RIGHT TO REMOVE IS NOT A STATUTORY GROUND UPON WHICH REMAND MAY BE BASED.

Respondent ruled, and her order so states, that Petitioner's acts between December 4, (date of the proposed order) and December 27, 1978 (date on which the Petitioner removed), constituted "waiver" of its right to remove. A. 22a, 24a.

The concept of waiver of the right to remove developed over the years as a form of estoppel by which to prevent a removing defendant from experimenting with the merits of his case before removing to federal court. *See Rosenthal* v. *Coates*, 148 U.S. 142 (1893). By this concept, although a defendant might waive the right to removal, the intent to waive must be clear, unequivocal and inconsistent with removal.[8] *Genie Machine Prod., Inc.* v. *Midwestern Machinery Co.*, 367 F. Supp. 897 (1974); *Davila* v. *Hilton Hotels International Inc.*, 97 F. Supp. 32 (1951). The concept of "waiver," however, is not found in the statutes authorizing removal. Waiver is not expressly set-forth as a ground for remand and, from the text of the applicable statutory provisions, waiver cannot be found or implied. Hence, the inescapable conclusion that "waiver" is a non-statutory ground in the context of remand and remand may not be solely premised thereon.

"WAIVER" OF THE RIGHT TO REMOVE CANNOT OCCUR PRIOR TO REMOVABILITY ARISING.

Not only is the waiver of the right to remove non-statutory, but inasmuch as the right to remove did not accrue

[8]This cannot be found in Petitioner's actions. Clearly, Petitioner always intended to remove and acted consistent with its desire, basing its actions on the established statutes and case law. See note 2, p. 5, *supra*.

until the effective date of Judge Burdick's order—and Petitioner removed the next day—it can have no application.

Waiver of the right to remove cannot occur before the right to remove exists because "waiver is the voluntary relinquishment of a *known right.*" *Houlton Sav. Bank* v. *American Laundry Machinery Co.*, 7 F. Supp. 858, 862 (1934). "To operate as a waiver, the act of the party must be irreconcilably repugnant to the assertion of his *legal right.*"[9] *Houlton, supra* at 861, quoting *Whiteley Malleable Castings Co.* v. *Sterlingworth Ry. Supply Co.*, 83 F. 853 (1897). Thus, the right to remove must be known and it must be a legal right before waiver can accrue. Before an effective order dismissing the sole non-diverse party defendant, Howard W. Zantop, existed there was no right, legal or otherwise, for Petitioner to remove and therefore "waiver" is inapplicable.

Not only did the Respondent base her order for remand upon the non-statutory, unauthorized grounds of waiver, but Respondent also based her remand on the judge made ground of waiver before any legal right to removal existed and certainly before any waiver could arise. Even if "waiver" is an acceptable judicial ground for remand, it is not acceptable as the only stated ground where waiver could not have existed.

Not only were the principal cases reviewable by mandamus because of the utilization of a non-statutory basis for remand, but even accepting waiver as possible, it could not have formed a basis for remand of the principal cases. Since it was by error that Respondent reached her con-

[9]See note 8, p. 16, *supra*.

clusion that non-statutory grounds for remand existed, the cases were ripe for mandamus by the Court of Appeals. The Sixth Circuit's summary denial of Petitioner's petition justifies this Court's issuance of its writ of certiorari.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,
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June 15, 1979

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. .....

EXECUTIVE JET AVIATION, INC., Petitioner,

v.

HONORABLE PATRICIA A. BOYLE, Judge of the United States District Court, Eastern District of Michigan, Southern Division, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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*Substantially identical documents were filed in both principal cases. Only one is reproduced in the Appendix for brevity.

†The attachments to the petition and bond have been deleted as redundant or immaterial.

‡The transcript bears the entitlement of only the Carroll case although the transcript is applicable to both principal cases.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

1978

Dec. 26 Order granting summary judgment to non-diverse defendant Howard W. Zantop signed by Judge Burdick.

27 Petitioner's petition and bond for removal filed.

1979

Jan. 12 Plaintiff Green's motion and brief for remand of cause filed and received by defendant Executive Jet.

23 Plaintiff Carroll's motion and brief for remand filed and received by defendant Executive Jet.

30 Defendant Executive Jet's answer and brief in opposition to plaintiffs' motions for remand.

Feb. 9 Orders remanding cause signed and entered by District Court.

14 Defendant Executive Jet's petition for writ of mandamus or in the alternative, writ of prohibition filed in the United States Court of Appeals of the Sixth Circuit.

15 Defendant Executive Jet's motion for stay denied by Judge Boyle.

16 Defendant Executive Jet's motion for stay denied by the United States Court of Appeals for the Sixth Circuit

23 Defendant Executive Jet's motion for stay denied by Sixth Circuit Justice Potter Stewart.

25 Defendant Executive Jet's motion for stay denied by the United States Supreme Court.

Mar. 22 Petitioner Executive Jet's petition for writ of mandamus denied by the United States Court of Appeals for the Sixth Circuit.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

ESTATE OF DANIEL KEITH GREEN,
Plaintiff,

-v- Civil Action No. 73-256770-CZ

GATES LEARJET CORPORATION, EXECUTIVE JET AVIATION, and HOWARD ZANTOP, jointly and severally

Defendants.

ESTATE OF HOWARD RAY CARROLL, deceased, by MAPLENE CARROLL, Administratrix,
Plaintiff,

-v- Civil Action No. 74-019946-CZ

GATES LEARJET CORPORATION, EXECUTIVE JET AVIATION and HOWARD ZANTOP, jointly and severally,

Defendants.

Proceedings had before the HONORABLE IRWIN H. BURDICK, Circuit Judge, Third Judicial Circuit Court, held at Room 432 Lafayette Building, Detroit, Michigan on November 27, 1978.

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• • •

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Detroit, Michigan
Appearing on behalf of Howard Zantop, Defendant.

(Tr-3)

Detroit, Michigan
Monday, November 27, 1978
Morning Session.

— — —

THE COURT: This is the case of the Estate of Green and Carroll against Gates Learjet Corporation, et al. We'll now hear from the "et al."

MR. LYNCH: John Lynch, your Honor, appearing on behalf of Howard Zantop, Individually. Our purpose in being before you this morning is to put before you a Motion for Summary Judgment that has been pending and was originally scheduled for November 15th, the date—the most recent date of trial.

The record should reflect that all parties are presently in court and represented. And it's my understanding that the Motion for Summary Judgment that has been submitted, has been opposed originally by the Plaintiff, and the Court has had an opportunity to read those briefs.

There is also a memorandum of points and authorities in opposition to that motion, by Gates Learjet. It is my understanding this morning that the opposition by the estate of Daniel K. Green and the estate of Howard Ray Carroll will be withdrawn, and the opposition on behalf

(Tr-4)

of Gates Learjet will also be withdrawn.

I assume, under those circumstances, that the Motion

for Summary Judgment on behalf of Howard Zantop individually, will be granted by this Court.

THE COURT: All right, let's hear from other counsel.

MR. INGRAM: Yes, your Honor. Just as a matter of housekeeping, I guess, I think the record will reflect that Plaintiff Green and Carroll have never filed an opposition to this Motion for Summary Judgment. The opposition was filed by Gates Learjet.

In addition, your Honor, before any ruling on the Motion for Summary Judgment, I'd like one other matter of housekeeping cleaned up, and that is, Howard Zantop, the Defendant Howard Zantop had filed an amended witness list to which we objected. And I understand at this time that before your Honor rules on the Motion for Summary Judgment, that Howard Zantop has agreed to withdraw that witness list, as it was untimely.

MR. LYNCH: On behalf of the Defendant Howard

(Tr-5)

Zantop, I will withdraw two witness lists that were submitted after the original witness lists was submitted to the Court.

THE COURT: All right; anybody else?

MR. DEMAS: Yes, Louis Demas for the estate of Howard Ray Carroll. We have not, as Mr. Ingram stated, filed an objection to this Summary Judgment, nor will we; nor do we object to the Summary Judgment being entered.

MR. ADAMS: For the record, your Honor, David Adams, appearing on behalf of Gates Learjet Corporation. It is true that Gates Learjet will withdraw its opposition to the motion of Howard Zantop for Summary Judgment, with the understanding that the granting of that motion will be entered only on Zantop's motion running against

Plaintiffs; that it will have no effect on any other cross-claims, counter-claims or any other claims and these or any other actions, and that Howard Zantop will dismiss his cross-claim against Gates Learjet pending in this action with prejudice and without costs.

On that basis, your Honor, Gates Learjet does not oppose the motion and withdraws its memorandum.

(Tr-6)

THE COURT: Anybody else want to speak on the subject?

MR. WHITE: Yes, your Honor. Gerald White, speaking on behalf of the Defendant Executive Jet. Through the kindness of the Court and in the integrity of the attorneys involved, I am aware that there is a settlement between Howard Zantop, either in an individual capacity or through an arranger insurance company. Sums of money are being offered and/or accepted by the Plaintiffs, and that I believe that there was oral opposition to Motion for Summary Judgment. They were discussed with the Court, so that I believe that before this matter is concluded by the Court, there should be a disclosure either by the attorney for Zantop or preferably, by attorneys for the Plaintiffs' estates, as to how much monies are involved, so that they acquiesce in the granting of a dismissal of Howard Zantop individually.

As counsel for Learjet says, there are other motions that are going to be resolved after the Court has a hearing on this one. But because I am the remaining Defendant, I believe that there has to be a disclosure of the amounts of settlement; the facts of the settlement and who is paying them.

(Tr-7)

MR. INGRAM: Your Honor, this is not a dismissal. As I understand, there's a Motion for Summary Judgment before the Court as to one party, and that is what this is concerned about.

THE COURT: Well, I understand that Mr. White wants to preserve his right to disclosure, which would have no effect on the Motion for Summary Judgment anyway; is that correct?

MR. INGRAM: I just want to set the record straight, as far as the record is concerned. This is not a dismissal. This is a Motion for Summary Judgment.

THE COURT: That is correct. It would be sort of naive to take the position that there wasn't any exchange of money. Obviously there has been a transfer of money. There is a question of whether or not it has to be disclosed. That has no effect on the Motion for Summary Judgment. And there are other motions pending before this Court on the subject, with respect to the settlement involving Gates Learjet Corporation. So, we'll handle all that at the same time. Is that satisfactory, gentlemen?

(All counsel concur.)

THE COURT: All right. Therefore, at this time, the

(Tr-8)

Motion for Summary Judgment made by Zantop against the two Plaintiffs and against Gates Learjet, will be granted.

The amended witness lists that have been filed by Zantop will be ordered withdrawn. Is there anything else that has to be resolved at this time?

MR. LYNCH: At this point, your Honor, I think you also want to make an order to—with regard to a with-

drawal of cross-claim by Howard Zantop against Gates Learjet and likewise their withdrawal of their cross-claim by Gates Learjet against Howard Zantop, individually.

THE COURT: All right.

MR. ADAMS: May it please the Court, David Adams. Gates Learjet would move to withdraw its cross-claim against Howard Zantop. The withdrawal will be as is: Howard Zantop's withdrawal of its cross-claim; with prejudice and without costs and with the understanding that thereby Gates Learjet will not be prejudiced in any rights, claims or the like, which it may have in its case pending in Federal Court; that is Ranger versus Gates Learjet, Incorporated.

MR. LYNCH: For the record, I would also like to state

(Tr-9)

that the withdrawal of the cross-claim by Howard Zantop, individually, is not meant to affect, in any way, claims presently pending by Ranger Insurance Company and Zantop Aviation, against Gates Learjet Corporation in the United States District Court for the Eastern District of Michigan here in Detroit.

And upon that stipulation on the record, I will withdraw the cross-claim on behalf of Howard Zantop, individually, against Gates Learjet Corporation in these two matters presently pending.

THE COURT: Anybody else want to speak on the subject?

MR. INGRAM: Yes, your Honor. It's my understanding the Court, in granting the Motion for Summary Judgment, would be granting that with each side bearing their own costs? Is that correct?

THE COURT: Without costs. Anybody else want to speak on the subject? Mr. White, any comments?

MR. WHITE: No, your Honor. I do not believe that I can speak in connection with Mr. Lynch's withdrawal or resolution of claims that I'm not involved with.

(Tr-10)

THE COURT: All right. The Motion to Withdraw the Cross-Claim by Zantop against Gates Learjet and the Motion to Withdraw Cross-Claim of Gates Learjet against Zantop will be granted.

MR. LYNCH: Judge Burdick, if it's all right, I'll submit an order on this matter within the next couple of days.

THE COURT: All right.

MR. ADAMS: Your Honor, one further motion, and that would be Gates Learjet's Motion to Withdraw its Cross-Claim against Executive Jet Aviation, previously filed in this matter and that withdrawal is to be made without prejudice and without costs, upon the same understanding which prefaced my Motion to Withdraw the Cross-Claim against Howard Zantop.

THE COURT: All right, Mr. White, what do you have to say?

MR. WHITE: As counsel has indicated to me earlier that was going to be his plans and desires, I indicated to him that I did not believe that Gates Lear had a valid cross-claim against Executive Jet, because it was not filed under the rules—the provisions made under the rules.

I don't believe that I, as an attorney can stop him if the

(Tr-11)

Court wishes to give him permission. If he want to withdraw his Complaint, be it pending in this court or not, I do not believe that I can stop him. The Court has a right

to grant whatever the thing is or is not accurately pending.

MR. ADAMS: Your Honor, I would take issue with the comment, with respect to the propriety and legality of any cross-claim, the cross-claim which was filed against Executive Jet Aviation, for the record.

THE COURT: All right, Motion to Withdraw the Cross-Claim of Gates against Executive Jet will be granted. Anything else?

MR. WHITE: Those are the only matters, as I understand, were discussed in chambers for requirements to be placed on the record, at this time.

THE COURT: Is that it?

MR. INGRAM: We still have the other pre-trial motions, your Honor.

* * *

STATE OF MICHIGAN)
) SS.
COUNTY OF WAYNE)

I, Aundrea Hill, do hereby certify that I have reported the proceedings had in the above-entitled cause set forth and that I do further certify that the foregoing 12 pages constitute a true and accurate transcript of the proceedings stenographically reported therein.

/s/ AUNDREA HILL
Official Court Reporter

Detroit, Mi.
Dated: December 5, 1978.

* * *

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

ESTATE OF HAROLD RAY CARROLL,
Deceased, by MARLENE CARROLL,
Administratrix,

Plaintiff,

vs. No. 74-019,
GATES LEARJET CORPORATION, 946 CZ
et al,

Defendants.

ORDER FOR SUMMARY JUDGMENT AND
WITHDRAWAL OF CROSS CLAIM

At a session of said Court held in the City-County Building, Detroit, Michigan on Nov. 27, 1978.

PRESENT: HONORABLE IRWIN BURDICK, Circuit Court Judge.

The Court, after hearing a Motion for Summary Judgment on behalf of Howard W. Zantop, individually, against the Estate of Harold Ray Carroll, and further viewing a written Motion and Brief in support thereof for Summary Judgment by Howard W. Zantop, and the Court being further fully advised in the premises thereof;

IT IS HEREBY ORDERED THAT Howard W. Zantop shall have an Order for Summary Judgment of No Cause for Action in favor of Howard W. Zantop and against the Estate of Harold Ray Carroll.

IT IS FURTHER ORDERED that Cross Claim by Howard W. Zantop against Gates Learjet Corporation, a foreign corporation, is hereby dismissed with Prejudice and Without Costs; this Order is not meant to effect in any

way whatsoever the claims or defenses presently pending by Zantop Airways, Inc. and Ranger Insurance Company against Gates Learjet Corporation, United States District Court, Eastern District of Michigan, Southern Division, Case No. 75-572-539.

/s/ IRWIN H. BURDICK
Circuit Court Judge

Approved as to form:
/s/ LOUIS DEMAS
/s/ DONALD E. SHELY
/s/ GERALD G. WHITE
JOHN J. LYNCH

A TRUE COPY
JAMES R. KILLEEN,
Clerk
By: /s/ .....
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ESTATE OF HAROLD RAY CARROLL, Deceased, by MARLENE CARROLL, Administratrix,
Plaintiff,

Case No. 873324

-vs-

GATES LEARJET CORPORATION, a foreign corporation; Executive JET AVIATION, INC., a foreign corporation; and HOWARD W. ZANTOP, jointly and severally,
Defendants.

Wayne County Civil Action No. 74-019946-CZ

PETITION FOR REMOVAL
BOND FOR REMOVAL

Gerald G. White
Rockwood W. Bullard III
PATTERSON & PATTERSON,
WHITFIELD, MANIKOFF,
TERNAN AND WHITE
Attorneys for
Defendant Executive Jet
Ten West Square Lake Road
Bloomfield Hills, Michigan 48013
(313) 333-7041

(Title of Court and Cause)

PETITION FOR REMOVAL

To the United States District Court for the Eastern District of Michigan, Southern Division:

NOW COMES Executive Jet Aviation, Inc., a foreign corporation, whose principal place of business is Columbus, Ohio, Defendant herein, by its attorneys, Patterson & Patterson, Whitfield, Manikoff, Ternan and White, and respectfully petitions this Court pursuant to 28 USC 1441 and 1446 to remove an action commenced in the State Court of Michigan for the following reasons and upon the following grounds:

1. Plaintiff filed a Civil Complaint in the Circuit Court for the County of Wayne, State of Michigan, docket number 74-019946-CZ seeking damages against the Petitioner herein. The Complaint was filed on or about June 21, 1974, and served upon the Defendant.

2. Thereafter, on or about November 27, 1978, Plaintiff consented, upon consideration being given, to the granting of a summary judgment dismissing Howard W. Zantop, the sole non-diverse party defendant in the within cause, the order for which was entered on or about December 26, 1978, and served upon this Defendant on or about December 26, 1978. A copy of said order and transcript of proceedings are attached hereto. Defendant Gates Learjet Corporation was dismissed on or about December 12, 1978; a copy of the Order dismissing Gates Learjet Corporation is attached hereto.

3. The action described in paragraph one above, is a civil action of which this Court has original jurisdiction under the provisions of 28 USC 1332, as amended (diversity of citizenship), and is one that may be removed to this Court by petition of Defendant herein, pursuant to the provisions of 28 USC 1441(a), in that it is a civil action wherein the matter in controversy exceeds the sum or value of $10,000.00 exclusive of interest and costs and is between citizens of different states; and, pursuant to the provisions of 28 USC 1446(b) in that, althoug not removable by the initial pleadings, it has been ascertained that the case has become removable by virtue of the Order of December 26, 1978, dismissing Howard W. Zantop, the non-diverse party hereto.

4. The named Plaintiff at the time the action was commenced was and still is the Estate of Harold Ray Carroll, Deceased, by Marlene Carroll, Administratrix (Wayne County Probate Court Number 637, 984), a citizen of the State of Michigan. The Defendant, Executive Jet Aviation, Inc., at the time the action was commenced and

at the present is a corporation incorporated under the laws of the State of Delaware, and was not and is not a citizen of the State of Michigan. The principal place of business of the Defendant was, at the time the action was commenced, and continues to be Columbus, Ohio, and not the State of Michigan. Gates Learjet Corporation, at the time the action was commenced, was a corporation incorporated under the laws of the State of Delaware, and was not a citizen of the State of Michigan. The principal place of business of Gates Learjet Corporation was, at the time the action was commenced Wichita, Kansas, and not the State of Michigan. Howard W. Zantop was, at the time the action was commenced, a citizen of the State of Michigan, with his residence at 15270 Philomene, Allen Park, Michigan.

5. Petitioner attaches hereto a copy of the Order for Dismissal of Howard Zantop from the within cause and a copy of this Court's Ex Parte Order waiving the requirement of attachment of all pleadings and process filed in state court.

6. Petitioner attaches hereto a bond of good and sufficient surety conditioned, as provided by 28 USC 1446(d), that it will pay all costs and disbursements incurred by reason of the removal proceedings hereby brought should it be determined that this action is not removable or is improperly removed.

WHEREFORE, Petitioner prays for the removal of the above captioned cause from the state court to this Court.

PATTERSON & PATTERSON,
WHITFIELD, MANIKOFF,
TERNAN AND WHITE
/s/By: GERALD G. WHITE
(P-22248)
/s/ By:
ROCKWOOD W. BULLARD, III
(P-26231)
Attorneys for Defendant
Executive Jet
Ten West Square Lake Road
Bloomfield Hills, Mich. 48013
(313) 333-7941

Dated: December 27, 1978

VERIFICATION

STATE OF MICHIGAN)
)
COUNTY OF OAKLAND)

Rockwood W. Bullard III, of lawful age, being sworn upon oath, says that he is an authorized attorney of Petitioner, that he has read the foregoing Petition for Removal and that the representations in the Petition are true to the best of his knowledge and belief.

/s/ ROCKWOOD W. BULLARD III

Subscribed and sworn to before
me this 27th day of December, 1978.
/s/ CLAUDIA E. WEST, Notary Public
Oakland County, Michigan
My commission expires: 2-7-79

(Title of Court and Cause)

BOND FOR REMOVAL

KNOW ALL MEN BY THESE PRESENTS: Executive Jet Aviation, Inc., as principal, and the Aetna Casualty and Surety Company, a Connecticut corporation licensed to do business within the State of Michigan, as Surety, are held and firmly bound, jointly and severally, unto the Estate of Harold Ray Carroll, Deceased, and its successors and assigns, in the sum of Five Hundred ($500.00) Dollars, for payment of which, well and truly to be made, we, and each of us, bind ourselves, our successors and assigns, jointly and severally by these presents.

WHEREAS, the condition of this obligation is such that: The said Defendant has petitioned the United States District Court for the Eastern District of Michigan, Southern Division, for removal to said Court of an action now pending in the Circuit Court for the County of Wayne, State of Michigan, wherein the Plaintiff is the Estate of Harold Ray Carroll, Deceased, by Marlene Carroll, Administratrix, and the Defendant is Executive Jet Aviation, Inc., said action being numbered 74-019946-CZ.

NOW, THEREFORE, the condition of the above obligation is such that if the said Defendant shall pay the costs and disbursements incurred by reason of the said removal proceedings if it be determined that said action was not removable or was improperly removed, then this obligation

shall be null and void, otherwise it shall remain in full force and effect.

EXECUTIVE JET AVIATION, INC.
/s/ By:
ROCKWOOD W. BULLARD, III
(P-26231)
AETNA CASUALTY AND SURETY COMPANY
A Connecticut Corporation
/s/ By:
RICHRD P. HUTTENLOCHER
Attorney-In-Fact

Dated: December 5, 1978

UNITED STATES DISTRICT COURT
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ESTATE OF HAROLD RAY CARROLL,
Deceased, by MARLENE CARROLL,
Administratrix,
Plaintiff,

-vs- Civil Action
GATES LEARJET CORPORATION, Number 873324
a foreign corporation,
EXECUTIVE JET AVIATION, INC.,
a foreign corporation and
HOWARD W. ZANTOP,
Jointly and Severally,
Defendants.

Excerpt of proceedings taken in the above-entitled matter

before the HONORABLE PATRICIA J. BOYLE, United States District Judge, on Friday, February 2, 1979, commencing at or about the hour of 5:10 p.m.

APPEARANCES:
ROBERT B. INGRAM, ESQ. and
LAWRENCE P. CANYOCK, ESQ.,
Appearing on behalf of Mary Lynn Green
LOUIS DEMAS, ESQ.,
Appearing on behalf of Marlene Carroll
GERALD G. WHITE, ESQ., and
ROCKWOOD BULLARD, III, ESQ.,
Appearing on behalf of Executive Jet Aviation, Inc.
DAVID ADAMS, ESQ.,
Appearing on behalf of Gates Learjet Corporation

CLAUDIA BURTON, RPR
Official Court Reporter

(Tr-3)

Detroit, Michigan
Friday, February 2, 1979
5:10 p.m.

THE COURT: You may be seated.

The issues that have been raised by the Motion for Remand and the Response are, as I see them, similar to what both Counsel have directed themselves to.

The question of whether the dismissal was voluntary or involuntary, whether the Petition to Remove was timely, and whether there was a waiver of the right to remove under 1446(b), which provides that within 30 days after receipt by, let's see, the Defendant through service or otherwise of a copy of an amended Pleading, Motion, Order, or other paper, from which it may first be ascertained

that the case is one which is or has become removable—excuse me. Did someone say something?

MR. WHITE: No, Your Honor. No one did.

THE COURT: The question of whether the dismissal was voluntary or involuntary does not, I believe, have to be determined because of the rest of the Court's ruling.

I find that under 1446(b) the earliest date at which the

(Tr-4)

Defendant knew, through copy of another paper, that it was first ascertained that the case was one which would become or which was removable was December 4th, which was the date, according to the parties' arguments, that the Order—and to the affidavits—that the Order for Summary Judgment was presented for approval; and for that, I am relying on the Opinion of *Gibson* vs. *The Atlantic Coastline Railroad* and the citation of that case is 299 F. Supp. 269, which is very similar to the facts in this case.

There was an amended Complaint, there was a Motion filed to amend the Complaint. The Motion was granted orally on February 10th.

On February 19th the Defendant received the proposed Order to be entered pursuant to the Court's oral decision, and the District Court for the Southern District of New York held that the time began to run as of the presentation of the Order for approval.

The Court will also find that the Defendants actions in the state court do constitute a waiver of the right to removal.

The standard—the Court is aware that the evidence must show a clear intent to waive, and the Court finds from the following, not all of which occurred prior to December 4th—I should say prior to November 27th—but

certainly, many of the items I am about to refer to did:

(Tr-5)

The response to the Motion in Limine; the ordering of a transcript, apparently for the purposes of appeal; argument of the leave to amend, particularly the review of depositions; and the argument of the evidentiary matters.

I should indicate also that the immediacy of the trial is something that I am relying on in terms of the Court's ruling.

Moore on Federal Practice and Procedure indicates that, Section 157(a), as follows: "Where the action becomes removable shortly before or at the trial, the defendant must take immediate steps to remove the case if his right is to be preserved, and unless he does so, proceeding to or continuing with the trial constitutes a waiver of the right of removal, even though the 30 day period may not have elapsed."

I think that what did occur here, that is to say, extensive discussions and argument in Court on the record relating to the admissibility of this evidence, was in the context of the trial.

It would seem to me that the proper procedure for the defense would have been to have asked Judge Burdick for an adjournment to prepare the Petition for Removal. Instead, the merits to assert extent of the case were tested, at least in the evidentiary context, and in the context of the

(Tr-6)

question of whether the Defendant should have been dismissed because of payment, especially in light of the immediacy of the trial. The Defendant should have taken prompt action, and any lack of diligence on the part of Mr. Lynch cannot be attributed to the Plaintiffs in this matter.

For those reasons, the Court will find that the removal was waived, the right to remove was waived by clear action of the Defendants, and the Plaintiff's Motion to Remand will therefore be granted. No costs will be imposed.

MR. INGRAM: Thank you, Your Honor.

THE COURT: Thank you, Counsel.

MR. WHITE: Thank you, Your Honor.

THE COURT: Would the Plaintiffs present an Order?

MR. INGRAM: Yes, Your Honor. Promptly, Your Honor.

MR. DEMAS: Two separate Orders, Your Honor?

THE COURT: Yes. Two Orders, please.

I understand that there is need for prompt submission because if the matter is going back it has to go this week to go to Judge Burdick's docket. That was what Mr. Pflepson just explained to me.

(Tr-7)

MR. INGRAM: Yes, Your Honor.

THE COURT: Thank you.

MR. INGRAM: Thank you, Your Honor.

THE CLERK: The Court is now recessed.

(The proceedings adjourned at 6:20 p.m.)

CERTIFICATE

I, CLAUDIA BURTON, DO HEREBY CERTIFY that I have recorded the proceedings had in the above-entitled matter at the time and place hereinbefore set forth, and I do further certify that the foregoing is a true and accurate transcript of my stenographic notes of the proceedings therein reported.

/s/ CLAUDIA BURTON, RPR
Official Court Reporter

(Title of Court and Cause)

ORDER REMANDING CAUSE

At a session of said Court held in the Courtrooms of the United States District Court at the City of Detroit, Michigan, on February 9, 1979. PRESENT: Honorable PATRICIA J. BOYLE, U. S. District Judge.

Petition for removal having been made by defendant Executive Jet Aviation, Inc. to this Court pursuant to 28 U.S.C. § 1446(b) on December 27, 1978, and plaintiff having made and filed its motion for remand to the Wayne County Circuit Court, from which the within cause was removed, and the Court having heard oral argument on February 2, 1979, supplements its oral findings of fact and conclusions of law with the following:

On November 27, 1978, the Wayne County Circuit Court, Judge Irwin Burdick presiding, orally granted summary judgment for Howard W. Zantop, the sole non-diverse defendant in the within action. On December 4, 1978, counsel for defendant Howard W. Zantop presented a proposed order to counsel for defendant Executive Jet and plaintiff Green for approval, which proposed order was so approved by said parties. On December 26, 1978, Wayne County Circuit Court, Judge Irwin Burdick signed an order granting summary judgment to defendant Howard W. Zantop.

The date defendant Executive Jet received a "paper" by which the right to remove arose pursuant to 28 U.S.C. § 1446(b) was on December 4, 1978, when a proposed order granting summary judgment in favor of defendant Howard W. Zantop was presented for approval to counsel for defendant Executive Jet.

Subsequent to December 4, 1978, and prior to defendant Executive Jet's removal on December 27, 1978, extensive

discussion between counsel relating to depositions took place. Between December 4, and December 27, numerous evidentiary arguments relating to said depositions were made before Judge Burdick and ruled upon by him. Being that the case had been assigned for trial before Judge Burdick, and that the above arguments and rulings were preliminary to selection of a jury, immediate action on the part of defendant Executive Jet was required with respect to removal.

The actions and conduct of defendant Executive Jet between approval of the proposed order granting scmmary judgment for Howard Zantop on December 4, 1978 and filing its petition and bond to remove on December 27, 1978, constituted waiver of its right to remove.

No issue as to the timeliness of defendant Executive Jet's petition to remove exists for the reason that plaintiffs submitted to the question of timeliness in oral argument before this court. The court finds it unnecessary hereby to reach the issue of whether plaintiffs' acts in settlement with Howard Zantop constituted voluntary acts.

IT IS HEREBY ORDERED AND ADJUDGED, that the within cause shall be and hereby is remanded to the Circuit Court for the County of Wayne, State of Michigan, from which it was removed.

IT IS FURTHER ORDERED AND ADJUDGED that the Clerk of this Court shall make out a certified copy of this order remanding the within cause and that he shall forward the same to the Clerk of the Circuit Court of the County of Wayne, State of Michigan.

IT IS FURTHER ORDERED AND ADJUDGED that no costs shall be assessed to either party and defendant

shall be and hereby is released from its removal bond.

/s/ PATRICIA J. BOYLE
U. S. District Judge

/s/ LOUIS DEMAS
Attorney for Plaintiff Carroll
/s/ GERALD G. WHITE
/s/ ROCKWOOD W. BULLARD III
Attorneys for Defendant
Executive Jet Aviation
(A True Copy)
/s/By: W. J. PFLEPSEN, Deputy Clerk
U. S. District Court
Eastern District of Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ESTATE OF DANIEL KEITH GREEN,
Deceased, by MARY LYNN GREEN,
Administratrix,
Plaintiff,

-vs- Civil No. 8-73325

GATES LEARJET CORPORATION,
a foreign corporation;
EXECUTIVE JET AVIATION, INC.,
a foreign corporation; and
HOWARD W. ZANTOP,
jointly and severally,
Defendants.

ESTATE OF HAROLD RAY CARROLL,
Deceased, by MARLENE CARROLL,
Administratrix,
Plaintiff,

-vs- Civil No. 8-73324

GATES LEARJET CORPORATION,
a foreign corporation;
EXECUTIVE JET AVIATION, INC.,
a foreign corporation; and
HOWARD W. ZANTOP,
jointly and severally,
Defendants.

ORDER DENYING DEFENDANT'S MOTION FOR STAY

On February 15, 1979, the defendant moved the Court for entry of an ex parte of this Court's orders remanding the above causes to state court. The Court being fully advised in the premises, and it appearing that waiver is a ground for remand not "wholly different from those upon which § 1447(c) permits remand," *Thermtron Products, Inc.* v. *Hermansdorfer,* 423 U.S. 336, 344 (1976), and that stay of an unreviewable remand order would be inappropriate under Rule 62(d), Fed. R. Civ. P.;

IT IS THEREFORE ORDERED that the motion for stay pending the outcome of defendant's petition for writ of mandamus is hereby DENIED.

/s/ PATRICIA J. BOYLE
United States District Judge

Dated: February 15, 1979
Detroit, Michigan

(A True Copy)
/s/By: W. J. PFLEPSEN, Deputy Clerk
U. S. District Court
Eastern District of Michigan

FILED
February 16, 1979
JOHN P. HEHMAN, Clerk

No. 79-8018

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ESTATE OF DANIEL KEITH GREEN,
DECEASED, BY MARY LYNN GREEN,
ADMINISTRATRIX, AND ESTATE OF
HAROLD RAY CARROLL, DECEASED, BY
MARLENE CARROLL, ADMINISTRATRIX,
Plaintiffs-Respondents,

v. O R D E R

EXECUTIVE JET AVIATION, INC.,
Defendant-Petitioner

Upon consideration of petitioner's emergency motion for stay or orders remanding cause and/or injunction to stay state court proceedings, and it not appearing that appellant has demonstrated substantial likelihood that it will prevail on the merits,

It is ORDERED that the motion be and it hereby is denied.

ENTERED BY ORDER
OF THE COURT
/s/ JOHN P. HEHMAN,
Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK

Washington, D. C. 20543
February 23, 1979

Rockwood W. Bullard, III, Esquire
Ten West Square Lake Road
Bloomfield Hills, Michigan 48013

Re: *Executive Jet Aviation, Inc.* v. *Estate of Daniel Keith Green, etc., et al.*, A-748

Dear Mr. Bullard:

Your application for stay in the above-entitled case has been presented to Mr. Justice Stewart, who has endorsed thereon the following:

"Application denied
February 21, 1979
Potter Stewart"

As per your request, the application was resubmitted to Mr. Justice White who referred it to the Court. Enclosed is an order of the Court in this case.

Very truly yours,
MICHAEL RODAK, JR.,
Clerk
/s/ By: PATRICIA A. DEAN
Assistant Clerk

th
Enc.
cc: Robert I. Ingram, Esquire
Lawrence Canyock, Esquire
Clerk, U.S. Court of Appeals
6th Circ. (Your No. 79-8018)
(with copy of order to each)
Louis Demas, Esquire
Clerk, U.S. District Court-
Eastern Dist.
(Your No. Civil 8-73324-5)

FRIDAY, FEBRUARY 23, 1979
ORDER IN PENDING CASE

A-748 *EXECUTIVE JET AVIATION, INC.* V. *ESTATE OF DANIEL KEITH GREEN, ETC., ET AL.*

The application for a stay of the orders of the USDC for the Eastern District of Michigan, Southern Division, (Civil Nos. 8-73324-5), dated February 9, 1979, and to enjoin Michigan State Court proceedings, presented to Mr. Justice White and by him referred to the Court, is denied.

FILED
March 22, 1979
JOHN P. HEHMAN, Clerk

No. 79-1103

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EXECUTIVE JET AVIATION, INC.,
Petitioner,

v. ORDER

HONORABLE PATRICIA A. BOYLE,
JUDGE OF UNITED STATES DISTRICT
COURT, EASTERN DISTRICT
OF MICHIGAN,
SOUTHERN DISTRICT,
Respondent

BEFORE: CELEBREZZE, LIVELY and ENGEL, Circuit Judges

This matter has been submitted upon petitioner's petition for writ of mandamus and/or writ of prohibition. The relief of mandamus is a drastic remedy which should only be

utilized where the party involved has a clear and undisputed right to the remedies sought, *Kerr* v. *U. S. District Court,* 426 U. S. 394 (1976) or where the district court has abused its discretion, *Bankers Life and Cas. Co.* v. *Holland,* 346 U. S. 379 (1959).

The district court Judge did not abuse her discretion in finding that petitioner's action and conduct constituted a waiver of its right to remove the state causes to a federal forum pursuant to 28 U.S.C. § 1446(b).

It is ORDERED that the petitioner's petition for a writ of mandamus and/or a writ of prohibition be and it hereby is denied.

ENTERED BY ORDER
OF THE COURT
/s/ JOHN P. HEHMAN,
Clerk

IN THE

Supreme Court of the United States

October Term, 1979

No. 78-1883

EXECUTIVE JET AVIATION, INC., Petitioner
v.
HONORABLE PATRICIA A. BOYLE, Judge of the United States District Court, Eastern District of Michigan, Southern Division, Respondent,
ESTATE OF DANIEL KEITH GREEN, Deceased, by Mary Lynn Green, Administratrix, Respondent,
and
ESTATE OF HAROLD RAY CARROLL, Deceased, by Marlene Carroll, Administratrix, Respondent,
jointly, as real parties in interest.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION

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July 18, 1979

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION

The Respondents, ESTATE OF DANIEL KEITH GREEN, Deceased, by Mary Lynn Green, Administratrix, and ESTATE OF HAROLD RAY CARROLL, Deceased, by Marlene Carroll, Administratrix, respectfully pray that the Petition for Writ of Certiorari to Review the Judg-

ment of the United States Court of Appeals for the Sixth Circuit Court be denied.

QUESTIONS PRESENTED

1. Whether issuance of a Writ of Mandamus by the Court of Appeals is the appropriate remedy where a District Court enters a remand order based on erroneous grounds.

2. Whether Summary Judgment, eliminating the sole non-diverse party defendant from the State Court action, can create diversity requisite to federal removal jurisdiction.

3. Whether a proposed order, eliminating the sole non-diverse party defendant from the State Court action, can create removal jurisdiction diversity and satisfy the requirements of 28 U.S.C. §1446 (b) as an "other paper".

4. Whether remand may be based on a "waiver" of the right to remove.

COUNTER STATEMENT OF FACTS

After exhaustive and extensive discovery and Pre-Trial proceedings, respondent Green settled with defendant Gates Learjet, and said Defendant was dismissed in October of 1978. A similar settlement with respondent Carroll was reached and Learjet was dismissed accordingly, on November 15, 1978. The following three days consisted primarily of settlement conferences with the remaining Defendants. Thereafter, the action was assigned to the Honorable Irwin Burdick, Wayne County Circuit Court Judge for immediate trial on November 21, 1978. On

November 22, 1978, Judge Burdick began hearing trial motions (Motion in limine) prior to jury selection. No proceedings were held on November 23 and 24 because of the Thanksgiving holiday. On November 27, 1978, defendant Howard Zantop's Motion for Summary Judgment (originally set for November 15, 1978) was heard. Respondent Green and Carroll had not filed opposition to said Motion for Summary Judgment and same as to defendant Zantop was so granted. Upon motion, the captions of the subject cases were amended, removing defendants Gates Learjet and Howard Zantop, respectively. Counsel for Howard Zantop and Gates Learjet did not appear or participate further in the action and no transfer of money from Howard Zantop to respondents has ever been made. Petitioner Executive Jet Aviation, Inc., made no opposition to the Motion for Summary Judgment.

On November 27, 1978, Respondents moved to bar evidence of settlement negotiations with former defendant Gates Learjet. Judge Burdick granted Respondent's motion. At this time, Petitioner sought, and was granted, leave to move before the presiding Judge of the Circuit Court of Wayne County for adjournment of trial for the purpose of filing an appeal of the order in limine. Said motion was denied by the presiding Judge. Thereafter, petitioner Executive Jet Aviation, Inc., secured a certificate from the Court stenographer for purposes of perfecting appeal to the Michigan Appellate Courts.

Beginning on November 28, 1978, after a motion by Petitioner to amend the complaint was granted, evidentiary discussions were ordered by Judge Burdick in anticipation of jury selection. Said discussions and evidentiary hearings were held on the dates of: November 28, 29, 30, 1978;

December 1, 4, 7, 8, 12, 13, 14, 15, 18, 19, 20, 21, and 27, 1978.[1] On December 27, 1978, petitioner Executive Jet Aviation, Inc., removed said cause to the United States District Court for the Eastern District of Michigan, Southern Division. Prior to December 27, 1978, petitioner Executive Jet Aviation, Inc., never requested a suspension of the trial proceedings nor objected to the continuation of the trial proceedings for the purposes of preparing their bond and petition for removal. The cause was remand to the State Court on February 9, 1979.

Trial Proceedings, after remand, were re-initiated before Judge Burdick. On March 22, 1979, the jury returned a verdict in favor of respondents Green and Carroll against petitioner Executive Jet Aviation, Inc. The Judgment was entered on April 20, 1979.

[1]Petitioners proceeded to argue the merits of the case with regard to the admissibility of certain deposition testimony. Counsel for the parties made objections to questions in the deposition testimony of witnesses J. O. Johnson, R. C. Adams, Horace Parham, William Boggs, Virgil Gutridge, Robert Klapprott, Richard Breer, Joseph Hine, Larry Patterson, William Tolbert, Ronald Puckett, Robert Berry and Raymond Pahls.
Hearings were held before Judge Burdick and the Court ruled on all objections on the depositions of J. O. Johnson, R. C. Adams, Horace Parham, Virgil Gutridge made by each party, and 75% of the deposition of Robert Klapprott. In the deposition of Virgil Gutridge alone, Petitioner objected to and received rulings on approximately two hundred (200) questions. The attorneys for all three parties worked almost continuously on the deposition testimony from November 27, 1978, until petitioner Executive Jet Aviation, Inc., filed its Petition to remove this action to the Federal Court on December 27, 1978 at 2:30 p.m.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

I

ISSUANCE OF A WRIT OF MANDAMUS BY THE COURT OF APPEALS MAY BE APPROPRIATE IF REMAND IS BASED ON ERRONEOUS GROUNDS. HOWEVER, REMAND BASED ON AN "IMPROVIDENT" REMOVAL, IS IMMUNE FROM APPELLATE REVIEW.

28 U.S.C. §1447 (c), (d) provides that District Court remand orders, based on an "improvident" removal, are immune from Appellate review. Clearly, the Honorable Judge Patricia M. Boyle, properly exercised her discretion in remanding this cause of action in accordance with 28 U.S.C. §1447 (c). (Pet. App. 23a, 24a) Petitioner Executive Jet Aviation, Inc., was "improvident" in removing, having waived any right to remove by continuing with the trial Court proceedings without objection after the occasion for removal arose. (See Counter Statement of Facts, at 3, 4)

The Sixth Circuit Court of Appeals denied Petitioner's request for a writ of mandamus, affirming Judge Boyles discretion in remanding for the reasons set-forth in her Order of Remand. (Pet. App. 23a, 24a) Further, the Court of Appeals held that the issuance of a writ of mandamus, to circumvent the bar of 28 U.S.C. §1447 (d) to Appellate review of remand orders, was a "drastic remedy . . . [only to] be utilized where the party involved has a *clear* and *undisputed* right to the remedies sought." (Emphasis added) (Pet. App. 29a, 30a) Not only is Petitioner's right to a remedy both unclear and disputed, there exists no wrong in need of remedy.

II

SUMMARY JUDGMENT, ELIMINATING THE SOLE NON-DIVERSE PARTY DEFENDANT FROM THE STATE COURT ACTION, CAN CREATE DIVERSITY REQUISITE TO FEDERAL REMOVAL JURISDICTION.

As the District Court Judge found the extensive discussions and evidentiary argument in which petitioner Executive Jet Aviation, Inc., participated were in the context of trial, immediate steps should have been taken to preserve Petitioner's right to remove.

The granting of the Motion for Summary Judgment was the event that put Petitioner on notice of his right to remove. Clearly, Executive Jet Aviation, Inc., cannot assert that a written order controls when the time for removal begins: In *Stack* v. *Strang* 191 F. 2d 106 (2d Cir. 1951), the Court held the removal right arises even though the state action would not be a final (or formal) dismissal since leave to amend had been granted. The Defendant in *Stack* had waited beyond the statutory period to remove before making its motion, awaiting the receipt of the Plaintiff's amended complaint. Further, the right of removal is not conditioned upon or dependent on final determination of any of the state proceedings, *Hamilton* v. *Hayes Freight Lines*, 102 F. Supp. 594 (E.D. Ky. 1952), and is certainly not dependant upon a formal written order dismissing the resident Defendant. *Id.; Stack, supra.*

Accordingly, Michigan does not require a writing for an order to have immediate effect. In *Goldstein* v. *Kern*, 82 Mich. App. 723, 267 N.W. 2d. 165 (1978), the Michigan Court of Appeals held that an oral pronouncement will be given immediate effect if the Judge so states. Further, if the parties have acted in good faith in accordance, and

relied on the Judge's oral statement, the order is final as of the oral pronouncement. *Saunders* v. *Smith*, 86 Mich. App. 1, 272 N.W. 2d. 174 (1978); *Eisman* v. *Eisman*, 86 Mich .App. 91, 272 N.W. 2d. 340 (1978).

Clearly, Judge Burdick's grant of Summary Judgment was to be given immediate effect, inasmuch as defendant Howard Zantop never appeared further in the action. Therefore, petitioner Executive Jet Aviation, Inc's., right to remove arose immediately, and since proceedings were in the context of trial, additional proceedings on the merits of the instant action (Motions in limine, ordering of transcript for appeal to the Michigan Appellate Court, the hearing on Petitioner's motion to amend their answer which, if granted, would dismiss Respondent's case, the review of the depositions and the argument of evidentiary matters, Pet. App. 5a, Tr-5) evidenced the Petitioner's willingness to further invoke the jurisdiction of the State tribunal. *Ford* v. *Roxana Petroleum*, 31 F. 2d 765 (N.D. Tex 1929); *Waldron* v. *Skelly Oil Corp*, 101 F. Supp. 425 (E.D. Mo. 1951).

A PROPOSED ORDER, ELIMINATING THE SOLE NON-DIVERSE PARTY DEFENDANT FROM THE STATE COURT ACTION, CREATES REMOVAL JURISDICTION AND SATISFIES THE REQUIREMENTS OF 28 U.S.C. §1446 (b) AS AN "OTHER PAPER."

28 U.S.C. §1446 (b) sets the time at which a Petition for Removal is to be filed:

§1446—Procedure for Removal

> (b) . . . after receipt by the Defendant, through service *or otherwise*, of a copy of . . . [an] *other*

paper from which it may be first ascertained that the case is one which is or has become removable. (Emphasis added.)

Circuit Court Judge Burdick granted Summary Judgment for the sole non-diverse party by oral decree on November 27, 1978. (Pet. App. 7a) On December 4, 1978, Petitioner Executive Jet Aviation, Inc., received notice by a proposed order embodying Judge Burdick's decree of Summary Judgment, that the cause of action had become potentially removable. This proposed order was submitted to Petitioner Executive Jet Aviation, Inc., and the Respondents for approval, and same was so approved by the parties on December 4, 1978.

The question of whether a proposed order satisfies the notice requirement of §1446 (b) was answered by the Court in *Gibson* v. *Coast Line Railroad Co.*, 299 F. Supp. 269, (S. D. N. Y. 1969).

In *Gibson*, the cause of action met all the requirements for a removable case except that the $10,000.00 jurisdictional amount had not been pleaded in the original complaint. Plaintiff motioned to amend the complaint, increasing the jurisdictional amount to a sum in excess of $10,000.00. The Court granted this motion orally in open Court and later, same was reduced to writing in the form of a proposed order. In determining the time at which the period for removal commenced pursuant to 28 U.S.C. §1446 (b), the Court held: ". . . certainly the service of the proposed order on [date] starts the running of the period [for removal]."

In the case at bar, as in *Gibson*, receipt of the proposed order eliminating the sole non-diverse party was such "other paper" within the purview of 28 U.S.C. §1446 (b). At this time, petitioner Executive Jet Aviation, Inc., had

notice that it must either stay the State Court proceedings and motion for removal or waive its right to same. Petitioner Executive Jet Aviation, Inc., chose the latter, proceeding with extensive litigation at the State Court level.

REMAND IS APPROPRIATE WHERE THE RIGHT TO REMOVE IS WAIVED.

Clearly, the resident Defendant was removed from the action upon oral grant of the Motion for Summary Judgment made by Howard Zantop or presentment of the draft of the written order to Petitioner. At that moment the right to remove, if any did exist, arose. A Defendant entitled to removal, waives that right by conduct demonstrating its willingness to further involve the jurisdiction of the State tribunal. *Ford* v. *Roxana Petroleum Corp.*, 31 F. 2nd 765 (N.D. Tex. 1929); *Fugard* v. *Thierry*, 265 F. Supp. 743 (N.D. Ill. 1967).

Being in Trial creates an immediate obligation on the party seeking removal to make some declaration as to their intention to embrace federal jurisdiction. In *Waldron* v. *Skelly Oil Co.*, 101 F. Supp. 425 (E.D. Mo. 1951) the Plaintiff had initiated his action against three corporate Defendants. As Plaintiff's counsel in *Waldron* began his opening statement, he dismissed the two resident corporations leaving Skelly Oil Co., a foreign corporation, as the sole Defendant. The Defendant waited until the end of the Plaintiff's opening statement before asking the Court for leave to suspend the trial to petition for removal. The District Judge denied the motion and the trial proceeded. The Court ruled that "when the case becomes removable during the process of the trial, the right to remove may

be waived by proceeding with the trial, unless timely objection is made." *Id.* at 426.

The *Waldron* Court in holding that:

> . . . when a cause first becomes removable during the process of a trial that the party must take immediate steps to remove the case if his right is preserved. . .

also cited *Morgan's L. & T. R. & S. S. Co.*, v. *Street*, 47 Tex. Civ. App. 194, 122 S.W. 270 (1909). In *Street*, the Defendant was informed by way of the Court's charges to the jury, that the resident Defendant had been dismissed. The Court held that this was the point at which Defendant's right to remove arose, and by allowing the trial Court proceedings to continue without objection, the Defendant waived its right to remove.

There is an obvious inequity in allowing a Defendant, with a removable action, to proceed at the State Court level, and then, being dissatisfied with the State Court decisions, have the issues readjudicated in the Federal Courts by way of removal. *Rosenthal* v. *Coates*, 148 U.S. 142 (1893); *In Re 73 Precinct Station House, Borough of Brooklyn*, 329 F. Supp. 1175 (E.D. N.Y. 1971).

Petitioner Executive Jet Aviation, Inc's., conduct in embracing the jurisdiction of the State Court goes well beyond mere minor involvement after the right to removal arose; more than a single day to oppose a preliminary injunction as in *Swan* v. *Community Relations*, 374 F. Supp. 9 (E.D. Wis. 1974); or to prevent an auction of its assets as in *Genie Machine Products, Inc.*, v. *Midwestern Machinery Co.*, 367 F. Supp. 897 (W.D. Mo. 1974); or oppose a preliminary injunction as in *Baker* v. *National Blvd. Bank of Chicago*, 399 F. Supp. 1021 (N.D. Ill. 1975); or to avoid default when the State Courts provided for a shorter time

to answer than the Federal Courts did to file the removal petition in *Champion Brick Co.* v. *Signade Corp.*, 37 FRD 2 (D. Md. 1965) and *Morris* v. *Vitele*, 412 F. 2d 1174 (9th Cir. 1969) Executive Jet Aviation, Inc., instead of merely taking a defensive posture, actively litigated the merits of the case in the State Court without objection, and then when it was not satisfied with the results received from the State Court, sat silently back while harboring a secret desire to have a final adjudication of the merits in Federal Court.

By arguing the admissibility of deposition testimony of six witnesses, Petitioners' conduct surely demonstrated an intent to further invoke the jurisdiction of the State Court and abandon and waive its right of removal to the Federal Courts. By actively participating in State Court proceedings from November 27, 1978, through December 27, 1978, without once raising to the State Court a motion for suspension of the proceedings for time to prepare to apply for removal and to secure the removal bond, Petitioner waived its right of removal. It could not then remove to Federal Court and in so doing receive a rehearing on the evidentiary issues. Petitioner Executive Jet Aviation, Inc., by its own affirmative action, waived its right of removal. Therefore, this case was properly remanded to the Courts of the State of Michigan.

CONCLUSION

For the reasons set-forth above, the Petition for Certiorari should be denied.

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